109-70

IN THE

Supreme Court of the U. S.

OCTOBER TERM, A. D., 1883.

The Massachussetts Mutual Life Insurance Company,

Appellant,

vs.

The Union Rolling Mill Company,

Appellee.

CASE NO. 172.

WASHINGTON, D. C.,
THE JOYCE ENGRAVING AND PRINTING COMPANY.
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THE MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, Appellant, *vs.* THE UNION ROLLING MILL COMPANY, Appellee.	*Case No. 172.*

BRIEF FOR APPELLANT BY S. W. PACKARD.

STATEMENT OF THE CASE.

This is an appeal by the Massachusetts Mutual Life Insurance Company as intervenor from the final decree rendered in favor of the Union Rolling Mill Company, upon its cross bill, filed in the suit of *John B. Dumont, against the Chicago and Illinois River Railroad Company, the Chicago and Alton Railroad Company, et al.*

A full statement of the facts of the case is made in the brief filed for the Chicago & Alton Railroad Company, and John B. Dumont, on their appeal from the same decree.

That appeal is numbered 141.

On the 29th of February, 1876, Augustus Frisbie filed an intervening petition in the suit alleging that he was the owner of $25,000 of the bonds of the Chicago & Illinois River Railroad Company, secured by the trust deed to George Straut, of March 1, 1875, and that there was a good defense to the bill of Dumont; but that he feared it would not be made on account of collusion between the complainant and some of the defendants, and he, therefore, sought a standing in court to protect his rights.

(See record, top page, 84-89.)

The same day an order was entered allowing said Frisbie "to intervene in this case to protect his intrest as such bond creditor."

(See record, side p. 252.)

After the Master in Chancery had filed his report on the cross bill of the Union Rolling Company, Mr. Frisbie filed his exceptions thereto.—(See top pages 470—473.) Among other exceptions Mr. Frisbie insisted that the Federal Court should not proceed further upon the cross bill as the same matter was pending on an original bill in the Circuit Court of Will County, Illinois, and the cross bill in the Federal Court was "an attempt to litigate matters in controversy between citizens of the same state."—(See record, side p. 1037).

On the 25th of May 1878, (See record side p. 1141) the Massachusetts Mutual Life Insurance Company was allowed to intervene in the suit.

At that time no final or interlocutory decree had been rendered in favor of the Union Rolling Mill Company.

In its intervening petition which was duly verified it set up the fact that it was the holder and owner of over $40,000 of the bonds of the Chicago and Illinois River Railroad Company secured by the trust deed to George Straut, dated March 1, 1865 including the bonds formerly owned by Augustus Frisbie and that as such owner it was interested to

prevent a sale of the railroad. The allegations of this intervening petition have not been answered or denied by the Union Rolling Mill Company, or any of the other parties to the suit.

After the decree had been rendered in favor of the Union Rolling Mill Company, on its cross bill, the Massachusetts Mutual Life Insurance Company, filed a petition for a rehearing.

(See record, side pages, 1175-1184.)

When the complainant sought to dismiss the original bill, the Insurance Company gave a stipulation consenting thereto, and that its petition might be dismissed, and the order for an injunction obtained by it might be vacated.

(See record, side p. 1188.)

But this stipulation was never acted on, and the intervening petitions of Frisbie and the Insurance Company have never in fact been dismissed. Afterwards application was made to dismiss the original bill, which was denied.

(See record, side p. 1184-1195.)

At the same time the petition of the Insurance Company for a rehearing was overruled.

After the court had ordered a sale of the road, the Insurance Company filed a sworn petition showing that since the commencement of the suit, it had become the legal holder of the Frisbie bonds, and others amounting with overdue interest to over $75,000, and that the decree in favor of the Union Rolling Mill Company, seriously impaired its rights and interests and, therefore, it prayed to be allowed to take an appeal.

(See record, side p. 1207.)

On the 11th of June, 1880, Mr. Justice Harlan granted leave to the Insurance Company on its petition to take an appeal, as an intervening petitioner.

(See record, top p. 536.)

And on the 26th of June, 1880, its appeal bond was filed and duly approved.

(See record, side p. 1217.)

That the Insurance Company as a purchaser *pendente lite* of Mr. Frisbie's interests, had the right to intervene, and represent those interests in its own name. See

Ex parte Railroad Company, 95 U. S., on p. 226

That it had the right to take an appeal.

See *ex parte* Jordon, 94 U. S., 248.

See also *ex parte* Cutting, 94 U. S., 14.

ASSIGNMENT OF ERRORS BY THE MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY.

1. The Court erred in entering a final decree in favor of the Union Rolling Mill Company and in ordering a sale of the property of the Chicago & Illinois River Railroad Company.

2. The Court erred in finding that the Union Rolling Mill Company was entitled to a statutory lien upon the railroad and other property of the Chicago & Illinois River Railroad Company, or any lien whatever prior and paramount to the bonds of the Chicago & Illinois River Railroad Company, dated March 1, 1875, and secured by the trust deed to George Straut, and the lease to the Chicago & Alton Railroad Company.

BRIEF.

I.

The Court erred in entering a final decree in favor of the Union Rolling Mill Company, and in ordering a Sale of the property of the Chicago & Illinois River Railroad Co.

The supplemental bill filed July 1, 1876, gave the defendants the right to plead, answer or demur to the original bill as thus supplemented, even though a previous answer had been filed to the original bill.

Gibson *vs.* Rees, 50 Ill., on p. 406.
Whitman *vs.* Powell, 2 De Gex & S., 570.
O'Callaghan *vs.* Blake, 9 Irish, 220.

"A supplemental bill, when properly before the court, is an addition to the original bill, and becomes part of it, so that the whole is to be taken as one amended bill."

1 Danl., Ch. Pr. 1536 in note, (4th Am. Ed.)

The Dumont bill should have been "dismissed as of course," by the court, after the plea of the Chicago & Illinois River R. R. Co. to the jurisdiction had been filed and the complainant had admitted its truth and sufficiency by not replying to it, or having it set down for argument, by the next succeeding rule day.

See 38th Equity Rule.

If the complainant had filed a replication to the plea and been deefated on the *facts* set up in the plea, the bill would then have had to be dismissed on the hearing as "*a matter of course.*"

Hughes *vs.* Blake, 6 Wheat, 452.

The Union Rolling Mill Company could not have filed its cross bill as an original bill, because the principal defendants were citizens of the same state with it.

Coal Co. *vs.* Blatchford, 11 Wall., 172.

A cross bill cannot be maintained in the Federal Courts for affirmative relief, except as a defense or as a consequent upon a decree in the original cause where the same bill could not be maintained as an original bill.

A pure cross bill is essentially different from an original bill in the nature of a cross bill.

A pure cross bill cannot be filed without leave of court.

Bronson *vs.* Railroad Cr., 2 Wall., 283.

It cannot introduce new parties.

Shields *vs.* Barrow, 17 How., 145.
Bank *vs.* Carrolton Railroad, 11 Wall., 632.

"A cross bill is confessedly only a mode of defense, and a dependency upon the original suit constituting, with the latter, but one cause."

Per Chancellor Cooper in Cobb *vs.* Baxter, 1 Tenn. ch., on p. 406.

If the original bill is without equity, the cross bill cannot be sustained.

Adams Eq., 7 Am. Ed., 402, note.

Because in such a case "there seems to be nothing on which to found a cross bill."

By the Court in Dill *vs.* Shahan, 25 Ala., on p. 703.

A "cross bill is auxiliary to the proceeding in the original suit and a dependency upon it."

Ayers *vs.* Carver, 17 How., 592, 595.
Cross *vs.* DeValle, 1 Wall, 14.
Dows *vs.* City of Chicago, 11 Wall., 112.
Ex parte Railroad Company, 95 U. S., 225.
Ayers *vs.* Chicago, 101 U. S., 187.
Rubber Co. *vs.* Goodyear, 9 Wall., 809.

When the original bill is dismissed this carries with it the cross bill.

Adams Equity, 7 Am. Ed., 402, note.
Continental L. Ins. Co., *vs.* Webb, 54 Ala., 694–5.
Elderkin *vs.* Fitch, 2 Carter (Ind.), 90.
Slason *vs.* Wright, 14 Vt., 208

"The pendency of a cross bill by one defendant is no answer to a motion to dismiss the original bill for want of prosecution by another defendant."

2 Daniels, Ch. Pr., 1556.

"A cross bill being generally considered as a defense or a proceeding to procure a complete determination of a matter already in litigation, the plaintiff is not at least as against the plaintiff to the original bill obliged to show any ground of equity to support the jurisdiction of the court. It is treated, in short, as a mere auxiliary suit or as a dependency on the original suit."

Story Eq., Pl., § 399.
2 Barb., Ch. Pr., 131.
2 Daniel, Ch Pr., 1549.

"If the cross bill seeks relief, it is indispensible that it should be equitable relief, otherwise the bill will be demurrable; for to this extent *it is not a pure cross bill*, but it is in the nature of an original bill seeking further aid of the court beyond the purposes of defense to the original bill, and under such circumstances the relief should be such as in point of jurisdiction the court is competent to administer."

2 Daniel, Ch. Prac., 1594, note.
Story, Eq. Pl., § 398
Cooper, Eq. Pl., 86.
2 Barb., Ch. Pr., 131.

In the Federal Courts a cross bill is only allowed as a defense or for relief consequent upon a decree in the original cause; and where no relief is obtained on the original bill so that the cross bill is unnecessary, then it can not be further maintained unless it could be maintained as an original bill.

Shields *vs.* Barrow, 17 How., 130, 145-6.
Cross *vs.* DeValle 1 Wall., 14.
Dows *vs.* City of Chicago 11 Wall., 112.

The reason a cross bill is allowed in the Federal Courts when the citizenship of the parties to it is such that it could not be prosecuted as an original bill, is, because of the *necessity* of the case. The defendant would otherwise be without redress from the plaintiff's suit.

The same necessity exists where a party seeks relief from or a construction of the decrees or judgments of a Federal Court, when his citizenship is such that the court could not entertain an original bill on his behalf.

But as the *necessity* of the case furnishes the *reason* for the rule, where this necessity ends the rule ceases to operate.

See Dunn *vs.* Clark, 8 Peters 1.
Christmas *vs.* Russell, 14 Wall., 80–83.

In this case there was no *necessity* for relief upon the cross bill, unless the complainant Dumont obtained relief and an order of sale upon the original bill.

II.

The Union Rolling Mill Company waived its right to a statutory lien for the materials furnished.

(*a.*) By agreeing to accept a lien on the materials furnished.

This lien, created by the contract between the owner of the freehold and the vendor, was a valid lien.

Rails put down upon a railroad become a part of the road —*real estate*—in the absence of an intention to the contrary, by the owner of the road.

Galveston R. R. Co. *vs.* Cowdry, 11 Wall., 482.
U. S. *vs.* N. O. R. R. Co., 12 Wall., 362.

But although "it is a long and well settled rule of the common law, that everything which is annexed to the freehold becomes part of the reality," yet "when the ownership of the land and of the chattel is vested in the same person, or when both owners concur in a common purpose, the presumption that a chattel is made a part of the land by being fastened to or incorporated with it, may be rebutted by proof of a contrary intention."

2 Smith's Lead. Cases, 7th Am. Ed.

Elwes *vs.* Mawe; top pages, 200 and 201; side page, 248, cases there cited.

So with rails. If the railroad company and the vendor of the rails agree that the vendor shall have a lien on the rails, that agreement is valid and binding between the parties, and and prevents the rails from becoming realty.

Pierce *vs.* Emery, 32 N. H., 485, on p. 521.

That rails incorporated into a road may still remain personal property. See also Ewell on Fixtures, p. 93, in note citing

Northern Cent. Ry. Co. *vs.* Canton Co., 30 Md., 347.
Haren *vs.* Emery, 33 N. H., 66.

An agreement to accept a lien or security upon a part of what the vender would otherwise have a lien upon, must necessarily amount to a waiver of his lien upon the balance.

The two liens are entirely inconsistant, and cannot exist together.

As was said by Chief Justice MARSHALL, in speaking for this court in the case of

Brown *vs.* Gilman, 4 Wheat., 290:

"*An express contract that the lien shall be retained to a specified extent is equivalent to a waiver of that lien to any greater extent.*"

To the same effect see Grant *vs.* Strong, 18 Wall., 623, and Taylor *vs.* Burlington C. R. & M. R. R. Co., 4 Cent. L. J., 535, a decision by Judge Dillon, where the vendor retained a lien on the materials furnished, which the learned judge held was "inconsistent in its nature with the right to a lien under the statute."

Even the taking of a mortgage on the whole of the same premises waives the lien.

Phillips on Mech's Lien, § 117.
Gormon *vs.* Sagner, 22 Mo., 137.

McMurray *vs.* Brown, 1 Otto, on p. 265–6.
Barrows *vs.* Baughman, 5 Cooley R., on p. 217, 218.
Young *vs.* Wood, 11 B. Mon. (Ky.), 128.

The right to remove the materials is inconsistent with the theory upon which the lien is given by the statute: namely, that the contractor has thereby enhanced the value of the property by inseparably blending his materials with the property of the owner.

On this point see

Davis *vs.* Alvord, 104 U. S., 547, 548.
Hunter *vs.* Blanchard, 18 Ill., 324.
Gore *vs.* Cother, 23 Ill., 638–9.
Houck on Liens, §54.
Taggard *vs.* Buckmore, 42 Me., 81.
Chapin *vs.* Persse, 30 Conn., 461.
Phillips on Mech's Liens, §148.

Where the lien is once waived it is gone forever. It rests on the statute and cannot be created or revived by contract, express or implied, when once waived.

Green *vs.* Fox, 7 Allen, 87–8.
Ilett *vs.* Collins, 103 Ill., 77.
Young *vs.* Wood, 11 B. Mon., 128.
Barrows *vs.* Baughman, 9 Mich., 213.
Gormon *vs.* Sagner, 22 Mo., 137.
Grant *vs.* Strong, 18 Wall., 623.

(*b.*) The statute provided for the payment of the debt, if a statutory lien was sought, *as a part of the current expenses of the road*, but the Rolling Mill Co. provided for a different remedy, inconsistent with the statutory remedy.

When a lien is given with a right to the rents and profits but no express right of sale of the *res*, a court of equity can accelerate the time of payment, if the debt cannot be paid within a reasonable time out of the rents and profits, but a

sale in such cases will be refused if the debt can be paid out of the rents and profits within a reasonable time.

2 Story Equity, §1216 *a*.
Burton *vs.* Smith, 13 Peters, 464.
Tennents Heirs *vs.* Patten, 6 Leigh, 196.

The cross bill in this case makes no allegations which would authorize the court to accelerate the time of payment and order a sale of the road.

[*c.*] *The provision in the contract providing for a credit beyond the time within which it would be necessary to file a bill to enforce a statutory lien, furnishes further conclusive evidence of a waiver.*

On this point see

Phillips Mchs. Liens, § 281.
Pryor *vs.* White, 16 B. Mon., 605.
Peyronx *vs.* Howard, 7 Peters, 345.

The fact that the notes were not given, as there was no forfeiture or *rescession* of the contract, does not affect this question.

Wheeler *vs.* Schroeder, 4 R. I., 283.
Barrows *vs.* Baughman, 9 Mich., 217, 218.

In such cases the debt does not become due and payable until the time the notes would have fallen due if they had been given, and no action for the price lies until then.

Story on Sales, § 236, p. 217, (Ed. 1871.)
2 Addison on Contracts, pp. 163–4, (Morgan's Am. Ed., 1876.)
3 Starkie on Ev., p. 1204–5.
3 Phillips on Ev., (5th Am. Ed. by Cowen, Hill and Edwards,) top p. 344, side p. 408.
1 Chitty on Plead., 14th Am. Ed., p. 346-7.
2 Saunders on Pl. and Ev., Pt. 1., p. 119.
1 Steven's *Nisi Prius* 283 and 284.

2 Chitty on Contracts (11th Am. Ed. from 9th Lond. Ed.) 1142.
1 Selwyn's *Nisi Prius* 73 and 74.
Paul *vs.* Dod., 2 Com. B., (Man. Gr. and Scott., 800.)
Yale *vs.* Coddington, 21 Wend., 175.
Mussen *vs.* Price, 4 East., 147.
Dutton *vs.* Solomonson, 3 Bos. & P., 582.
Campbell *vs.* Sewell, 1 Chitty R., 609.
Helps *vs.* Winterbottom, 2 Barn. & Adol., 431.
Eddy *vs.* Stafford, 18 Vermont, 235 and cases cited.
Hanneman *vs.* Inhabitants of Grafton, 10 Metc., Mass., 454, 458, and cases cited.

The statute of limitations does not begin to run on the debt until the arrival of the time when the notes would have fallen due, if they had been given, as the debt is not "*due and payable*" until then.

Angell on Limitations, 6th Ed., § 101, p. 97.
Wheeler *vs.* Schroeder, 4 R. I., 383, 386, 387.
Helps *vs.* Winterbottom, 2 Barn & Adol., 431.
Wood on Lim., 137.

In the case last above cited, goods were sold at six months' credit, payment to be then made by a bill at two *or three* months, at the purchaser's option; and it was held that that amounted to a credit of eight or nine months, and hence the claim was not barred, as the cause of action did not accrue until the bill would have fallen due if it had been given according to the agreement.

Lord TENTERDEN, C. J., saying:

"It is commenced in time, whether the term of credit be considered in the whole, as eight or nine months; and it appears to me that no action could have been maintained for goods sold and delivered, till the eight or nine months had expired. The plaintiff might have brought an action after the end of the six months, *for not giving a bill pursuant*

to the contract; but then he would not have recovered the whole price of the goods; he would only have been entitled to such damages as the jury might have thought reasonable for the breach of contract."

LITTLEDALE, J., said:

"The result of the cases is that, at the end of the six months, *an action lies for not delivering a bill according to the contract, the party being then entitled not to payment, but to a better security for his money.* In a suit, however, for this cause of action, the plaintiff would probably not recover anything approaching to the whole debt, and this is not the cause of action to which the statute of limitations would apply, upon a declaration for goods sold and delivered. It appears to me that such a declaration, after the end of the time for which the bill was to be given, is correct, and that the action, commenced within the six years after the expiration of the two or three months, is not barred by the statute."

III.

If the decree in favor of the Union Rolling Mill Company should be so modified in this case as to enforce the special contract lien on the materials furnished, such lien should be decreed subject to the lien of the Massachusetts Mutual Life Insurance Company, in respect to its bonds.

There is no testimony whatever, in the record showing that the Insurance Company or Frisbie had any notice of any lien by the Rolling Mill Company, on the rails, before they acquired the bonds in question. The law presumes that the holder of negotiable paper not due, acquired the same free of any notice of a defense to the paper itself, or the mortgage securing the same.

New Orleans *vs.* Montgomery, 5 Otto, 16.
Carpenter *vs.* Longan, 16 Wall., 271.

The claim, however, is made, that because Frisbie, in his intervening petition states that the bonds, in question, in August, 1875, were the property of the Chicago Railway Construction Company, that these parties must be treated as purchasers *pendente lite*, because the suit of the Rolling Mill Company was then pending in the Circuit Court of Will County, Illinois. But the case at bar was not then pending. It was brought January 8, 1876.

In reply to this claim we say that whether we are charged with constructive notice or not, depends upon whether we purchased pending *this suit* or not.

Where a second suit is begun for the same object as the first, *lis pendends* is held not to operate on a party purchasing during the pendency of the first suit.

Freeman on Judgments, § 203, and cases cited
Herrington *vs.* McCullum, 73 Ill., 483, and cases there cited.

Though the rails in question were personal property between the vendor and vendees yet as they were laid upon the railroad and the contract was not recorded they passed with a mortgage of that road as to all parties purchasing bonds secured thereby, *without notice* of this contract lien.

See VonKenren *vs.* The Cent. R. R. Co., 38 N. J , Law 165.
Pierce *vs.* Case, 10 Conn., 375.
Pierce *vs.* Emery, 32 N. H., 485.

Even if Straut, the trustee in the trust deed, had notice, that would not be notice to the bondholders.

Commissioners *vs.* Thayer, 4 Otto, 631.

But as no notice is charged in the cross bill the Rolling Mill Company cannot, without amending its bill and giving us a chance to be heard upon that issue, found any rights upon the theory that we did have notice.

Story Eq. Pl., 263 and cases cited.
Barrows *vs.* Baughman 5 Cooley R., 213.

IV.

The Union Rolling Mill Co. is not entitled to a statutory lien because the lien given by the statute is expressly made dependent upon a suit being commenced within six months after the contract is completed, for its enforcement.

The suit commenced in Will County, May 10, 1875, was brought before the cause of action had accrued, and, therefore, cannot be treated as a compliance with the statute; and the cross bill filed in this case, if treated as an original bill, came too late, as more than six months had then elapsed after the contract was completed on the part of the Rolling Mill Company.

The statute says the party who furnishes the material to the railroad company shall have a lien upon all its property for payment.

"*Provided*, suit shall be commenced within six months after such contractor or laborer shall have completed his contract with the said railroad corporation, or after such labor shall have been performed, or material furnished."

Revised Stat. of Ill. (1874), Sec. 51, Ch., 82.

The contract between the Union Rolling Mill Company and the Chicago & Illinois River Railroad Company, and the Chicago Railroad Construction Company, under which the material in question was furnished, has not been rescinded or forfeited, but is still in force. This is admitted in the cross bill, and the court found the contract to be still in force, as a judgement for $5,000 attorneys' fees was rendered against the Illinois River Railroad Company, and the Construction Company, which was warranted solely by the provisions of the contract.

Mr. Stubbs, the Secretary of the Rolling Mill Co., testified also that the contract had never been rescinded.

(See his disposition, top p. 261).

The contract provided for a term of credit, extending for a period of more than six months from the time the parties

expected the contract to be completed when it was entered into. And this fact, we have insisted, shows conclusively that the statutory lien was waived.

We now insist, that as a matter of fact, the right to file a bill to enforce a statutory lien did not exist on the 10th of May, 1875, when the Union Rolling Mill Company filed its bill in Will County, because the term of credit had not then expired.

Undoubtedly the Union Rolling Mill Company had the right on the 10th of May, 1875, to bring suit against the Chicago & Illinois River Railroad Company and the Chicago Railway Construction Company for a breach of its contract in refusing to give the notes and bonds as collateral thereto, for the deferred payments.

But such an action, we have shown by the authorities cited, would be simply for *damages* for a breach of the contract in refusing to give the notes and securities. No action could then be maintained to enforce the statutory lien, because the right of action for that purpose could not accrue until the time the notes would have fallen due, if they had been given.

The case of Wheeler *vs.* Schroeder, 4 R. I., 383, was a mechanic's lien case, and is exactly in point. See, also, the other cases cited and especially the case of Barrows *vs.* Baughman, 5 Cooley R., 217 and 218.

The original bill of Dumont was filed in the United States court on the 8th of January, 1876, and the cross bill of the Union Rolling Mill Company was filed in the same court on the 13th day of January, 1876. So if we treat the filing of the Dumont bill or the filing of this cross bill as the commencement of a suit within the purview of the statute, it came too late.

The Union Rolling Mill Company had fully completed its contract, at least, by the 10th of May, 1875, when it filed its bill in Will County. No material has been delivered or anything done under the contract, since that time.

That was over eight months before the cross bill was filed.

Hence, from whatever view we look at the matter, the Union Rolling Mill Company has failed to bring itself with the requirement of the statute as to the commencement of suit to enforce the lien within six months from the time it completed its contract.

Again, if the cross bill of the Union Rolling Mill Company is allowed to be prosecuted *as an original bill*, and not simply as a means of defense, or for complete relief consequent upon a decree in the original cause, we submit it cannot be sustained on the theory that the Will County suit was commenced in time.

As an *original bill* it must stand upon its own merits.

Even if the Will County suit was properly commenced, that will not aid the Union Rolling Mill Company in this *suit, except as a measure of defense.*

The Will County suit may be dismissed, and may never be prosecuted to a final hearing.

Would it be claimed by any one that if suit at law was brought upon this contract for money due under it, after the right of action had become barred by the general limitation laws of the state, that the plaintiff could make a good reply to the statute of limitation by setting up that it had commenced an action before the term of credit had expired, and hence, before the cause of action for money due under the contract had accrued, and that such action was still pending in another court?

And that is exactly what the Rolling Mill Company is attempting to do here.

If suit had been brought to enforce a statutory lien in this case, after the right to do so had accrued, and subsequently that suit had been discontinued and another commenced the next day for the same purpose, the second suit could not be maintained, provided it was commenced six months after the delivery of the last material. Why? Because the statute makes no provision for such a case. Nor